IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

No. 558

FEDERAL POWER COMMISSION,
*Petitioner,*

*v.*

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
*Respondents.*

## BRIEF OF RESPONDENT PANHANDLE EASTERN PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

E. ENNALLS BERL,
Delaware Trust Building,
Wilmington 28, Delaware.
*Attorney for Respondent Panhandle Eastern Pipe Line Company.*

ROBERT P. PATTERSON,
FRANCIS J. SYPHER,
*Of Counsel.*

# INDEX.

TABLE OF CITATIONS

*Cases:*



*Statutes and Miscellaneous:*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

No. 558

FEDERAL POWER COMMISSION

*Petitioner,*

*v.*

PANHANDLE EASTERN PIPE LINE COMPANY, *et al,*

*Respondents.*

## BRIEF OF RESPONDENT PANHANDLE EASTERN PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

### Opinions Below.

The findings of fact and conclusions of law of the District Court appear in the Record (R. 60-66). The opinion of the Court of Appeals for the Third Circuit, written by Judge Goodrich and not yet officially reported, appears in the Record (R. 74-81).

### Counter-Statement of Facts.

The Panhandle company is engaged in transporting and selling natural gas in interstate commerce. It is also engaged in producing natural gas.

The Natural Gas Act of 1938 grants regulatory authority to the Federal Power Commission over transportation of natural gas in interstate commerce and over sale of

natural gas in interstate commerce for resale to the public. At the same time the Act, by section 1(b), declares that its provisions

> "shall not apply . . . to the production or gathering of natural gas".

Panhandle, having plenty of gas in the ground,—more gas in the ground than pipe line capacity to transport such gas (R. 46),—transferred gas production leases on 97,000 acres in Kansas to Hugoton Production Company (a company it had caused to be organized), in exchange for the entire capital stock of the Hugoton company. Panhandle at the same time declared the entire issue of Hugoton stock as a dividend to its own stockholders, one share of Hugoton to every two-share holding of Panhandle stock. This transaction took place on October 11, 1948, and the Federal Power Commission was informally advised of it by Panhandle.

The gas production leases so transferred came to less than 5 percent of the total gas under control of Panhandle. The transaction made no substantial impairment in the ability of Panhandle to produce, transport and sell natural gas in interstate commerce. Moreover, the diminution, slight as it was, was offset by the development of marginal leases and unproven leases. (R. 27-28.)

The Hugoton company a few days later made a contract to sell the gas produced from the transferred gas leases to the Kansas Power and Light Company, for sale and consumption within Kansas. The transaction had the support of the Kansas Corporation Commission, the public regulatory agency of Kansas.

The dividend in Hugoton stock was payable to stockholders of record on October 29, 1948 and was to be distributed on November 17, 1948.

The Commission, under date of November 10, 1948, issued an order to Panhandle and Hugoton, directing them to show cause why the transfer of the gas leases by Panhandle should not be set aside.*

The Commission then brought the present suit in the District Court, asking for injunction and also preliminary injunction against distribution of the Hugoton stock certificates. At that time everything in the way of distribution except the final act of mailing the stock certificates had been done. The District Court, after hearing, denied preliminary injunction. The Commission appealed to the Court of Appeals for the Third Circuit. That court affirmed the order of the District Court. Successive restraining orders, however, have prevented distribution of the stock certificates.

## Ground of Decisions Below.

The ground of decision taken by the District Court and by the Court of Appeals was that the transaction attacked by the Commission had to do primarily with production of natural gas; that the Natural Gas Act by explicit provision excluded "production and gathering of natural gas" from the Commission's jurisdiction; and that the incidents relied on by the Commission as bringing the case within the scope of its authority did not carry significance.

Both courts also pointed out that it has been the practice in the industry to trade freely in gas leases, and that the Commission has never heretofore asserted the right to

---

* The Commission had already, on October 26, 1948, issued an order instituting an investigation of the transaction. That order was not an assertion of regulatory power, since by virtue of Section 14(a) of the Natural Gas Act the Commission's investigatory powers go beyond its regulatory powers. Panhandle does not oppose the investigation.

regulate transfers of such leases. The Court of Appeals also referred to the Commission's regulations, it being stated in the regulations that the Natural Gas Act did not give the Commission regulatory power over production of natural gas.

## Reasons for Denying the Writ.

The petition does not show any special or important reasons for granting the writ.

The decision of the Court of Appeals for the Third Circuit is not in conflict with any decision in another circuit.

The case does not present an important question of federal law that should be settled by the Supreme Court.

There is no claim that the decision constitutes such a departure from the accepted and usual course of judicial proceedings as to call for exercise of the power of supervision.

We submit, on the contrary, that the decision below was in conformity to the Natural Gas Act and was correct. Every point relied on by the petitioner here was given thorough consideration in the opinion written by Judge Goodrich.

## I.

### The Natural Gas Act in plain language excludes transfers of gas production leases from the jurisdiction of the Commission.

1. Section 1(b) of the Act provides:

> "The provisions of this act * * * shall not apply * * * to the production or gathering of natural gas".

The plan of regulation designed by Congress does not embrace control of production of natural gas by the Com-

mission, that activity having deliberately been left to control by state commissions.

*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 612;
*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 602;
*Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690;
*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 516.

2. The unmistakable meaning of section 1(b) of the Act has been recognized by the Commission itself. Although the Commission has had a set of rules for ten years, the rules have never suggested that dealings in gas leases should be submitted to the Commission for approval. On the contrary, the Commission's "General Rules and Regulations" provide:

> "The Federal Power Commission is of the opinion that it was the intent of the Congress that the control of production or gathering of natural gas should remain a function of the States and that the Natural Gas Act should not provide for regulation of those subjects" (18 Code Fed. Regs., Ch. I, Sec. 03.79).

This sentence from the Commission's own rules is an open acknowledgment that the Natural Gas Act gives it no control over production activities and no standing to bring this suit.

3. It is also significant that the present attempt to assert jurisdiction over dealings in gas leases is unique in the history of the Commission,—this despite the fact that it has always been common practice in the natural gas in-

dustry to deal freely in gas leases. Until this suit was commenced the Commission never intimated that it had the right to regulate transfers of gas leases.

See

*Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351.

## II.

**The fact that some of the gas leases had been included in the rate base for purposes of rate making does not furnish a shadow of jurisdiction for the regulation of gas leases.**

The Commission was well aware of the barrier erected by section 1(b) of the Natural Gas Act. In an effort to climb over that barrier it alleged in its complaint that certain of the gas leases involved in the transfer had been included by Panhandle in its rate base; also that Panhandle in applying for certificates of public convenience and necessity for construction of additional pipe line facilities had mentioned some of the gas leases as being part of its gas reserves and so might have "dedicated" such gas production leases to the service of its transportation facilities.

The amounts involved were trifling.

Aside from that fact, the Commission's argument proves too much, as the Court of Appeals pointed out. If it were sound, the Commission could move in on a broad front and assert regulatory power over all production facilities of virtually all natural gas companies,—to the utter disruption of regulation by the states over such production.

This court, in the *Colorado Interstate* case, *supra* (324 U. S. 581), pointed out that inclusion of production properties for rate making on insistence by the Commission does

not mean that the Commission has regulatory power over production properties of a natural gas company. After holding that for rate making purposes the Commission might include gas production facilities in the rate base,—this by reason of sections of the Act dealing specifically with rate making,—the Court went on to say:

> "That does not mean that the part of Section 1(b) which provides that the Act shall not apply 'to the production or gathering of natural gas' is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas" (pages 602-603).

This should dispose of the faint-hearted suggestion that the inclusion of some of these gas producing properties in the rate base of Panhandle, or possibly the mention of them in proceedings for certificates of public convenience and necessity on pipe line facilities, equipped the Commission with a regulatory power denied it by the Natural Gas Act.

## III.

**The complaint did not show any basis for issuance of an injunction.**

The courts below were right in holding that the Commission made no case for injunctive relief.

1. Under section 20(a) of the Natural Gas Act, the Commission may apply to a district court for an injunction against acts or practices

> "which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation or order thereunder."

The petition for certiorari makes no claim that the respondent has committed any act or practice in violation of any provision of the Natural Gas Act or of any rule, regulation or order. The petition makes no claim that the case was one for an injunction under section 20(a) of the Act.

2. The petitioner relies on the line of cases to the effect that courts will give injunctive relief to assist an administrative agency in exercise of its jurisdiction. These cases are not applicable where, as here, the organic statute by specific provision defines the situations in which the administrative agency has the right to go to the courts for injunctive relief.

Apart from that point, the "assistance" doctrine has no application. Under that doctrine probable jurisdiction in the administrative agency must be made to appear. In the present case probable jurdisdiction in the Federal Power Commission was lacking.

3. The petitioner, as a final argument, refers to the cases on the "primary jurisdiction" rule, such as *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, and *Macauley* v. *Waterman Steamship Corporation*, 327 U. S. 540. The "primary jurisdiction" principle has nothing to do with a case where jurisdiction in an administrative agency is visibly lacking and where litigation in the courts is commenced, not by the private party, but by the administrative agency. This aspect of the case was thoroughly discussed by the Court of Appeals.

The petition for certiorari is in error in stating that the courts below refused "to permit the Commission in the first instance to determine its statutory jurisdiction".

There was no such refusal. As the Court of Appeals said (R. 78):

> "But in this case no court is stepping between the Commission and the performance of its job. The Commission is, on the other hand, seeking court help, which it admits is discretionary, in a situation where its investigatory powers have been unopposed. When a party plaintiff seeks court help, it must show that it is entitled to such help. In determining whether a plaintiff is entitled to the relief asked, the court cannot escape the responsibility of deciding whether plaintiff has been given rights or powers for which court sanction is now sought."

## Conclusion.

The points involved are well settled and require no consideration by the Supreme Court. There is no conflict in the circuits on any of the matters pressed by the petitioner.

The petition for certiorari should be denied.

Respectfully submitted,

E. Ennalis Beel,
Delaware Trust Building,
Wilmington 28, Delaware,
*Attorney for Respondent, Panhandle Eastern Pipe Line Company.*

Robert P. Patterson,
Francis J. Sypher,
*Of Counsel.*